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In The

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari
To The Arizona Supreme Court

BRIEF OF *AMICI CURIAE* ARIZONA VOICE FOR CRIME VICTIMS, INC., NATIONAL CRIME VICTIM LAW INSTITUTE, IN SUPPORT OF RESPONDENT

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STATEMENT OF *AMICI CURIAE* INTEREST

Arizona Voice for Crime Victims, Inc. (AVCV), works to ensure that Arizona crime victims' state constitutional rights to justice and due process throughout the criminal justice process are protected. To achieve this purpose, Arizona Voice for Crime Victims educates and empowers victims through legal advocacy as well as crisis response training and continuing legal education for the judiciary and law enforcement.

The vision of Arizona Voice for Crime Victims is to establish a compassionate justice system in which crime victims know how to seek immediate crisis intervention when they become victims of crime, are informed of their rights under the Arizona Constitution, fully understand those rights, know how to assert their rights and have a meaningful way to enforce them.

Consistent with this vision is the goal of assisting the judiciary in balancing the Sixth Amendment and Eighth Amendment rights of the accused with the crime victim's need for finality and deterrence. Because of the potentially catastrophic effect this case may have on a victim's right to finality, AVCV has a strong interest in the outcome of this case.

The National Crime Victim's Law Institute (NCVLI) is a non-profit educational organization dedicated to defending the dignity and legal rights of crime victims and promoting a fair and balanced criminal justice system through legal education, legal scholarship, legal information resources and legal advocacy. It operates a legal clinic protecting victims through legal action and

has a strong interest in defending victims' rights to finality.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

"Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing that the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and crime victims alike." *Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 1493, 1501 (1998) (citing *Herrera v. Collins*, 506 U.S. 390, 421, 113 S.Ct. 853, 871, 122 L.Ed.2d 203 (1993).

Leesa Johnson, the daughter of Timothy Ring's murder victim, John Magoch, has spent the last eight years of her young life waiting for justice. On November 28, 1994, Leesa's father was robbed and brutally murdered while he was working as a Wells Fargo armored van driver

[1] Arizona Voice for Crime Victims, Inc. and the National Crime Victim's Law Institute file this brief with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with this Court. Counsel for Arizona Voice for Crime Victims, Inc. and the National Crime Victim's Law Institute authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Arizona Voice for Crime Victims, Inc., the National Crime Victim's Law Institute, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

servicing a Dillard's Department Store at Arrowhead Mall. John Magoch's killer was convicted by a jury of felony murder and was sentenced to death.[2] After years of appeals, Leesa Johnson finally was ready for "an assurance of real finality . . . (and to) . . . move forward knowing that the moral judgement (of the State) will be carried out."[3] – until now.

Now, if the Petitioner prevails, Leesa Johnson and hundreds of other family members of the nearly 200[4] additional Arizona homicide victims may, once again, be forced to return to court while the constitutional promise of finality[5] remains for them hollow and unfulfilled. This failure to secure "real finality" will not be because new evidence exonerating Timothy Stuart Ring has been found, but because a judge has followed precisely the Arizona Supreme Court and this Court's interpretation of the United States Constitution and found beyond a

[2] The trial judge filed the special verdict on October 29, 1997.

[3] *Calderon, supra* at 1493.

[4] *See* Donna Knudson, *Death Row Status Report Memorandum*, Arizona Department of Corrections Prison Operations Offender Service Bureau, March 15, 2002 stating that there are 129 inmates on Arizona's death row. Many are serving capital sentences for killing multiple victims.

[5] Article 2, § 2.1(A)(10) of the Arizona Constitution guarantees victims of crime the "right to speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence." Article 2, § 11 guarantees all Arizonans that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

reasonable doubt that the defendant's crime consisted of at least one aggravating factor.[6]

While *Ring v. Arizona*, 200 Ariz. 267, 25 P.3d 1139 (2001) provides this Honorable Court with the opportunity to clarify much of the constitutional chaos facing states authorizing capital sentencing that requires a judge, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death, it also provides this Court with the opportunity to address the important victims' rights that are at stake if this Court finds for the Petitioner.[7]

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[6] *See Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) (upholding Arizona's sentencing scheme), *Ring v. Arizona*, 200 Ariz. 267, 25 P.3d 1139 (2001) (Arizona Supreme Court was bound by Supremacy Clause to follow determination in *Walton v. Arizona*, upholding the constitutionality under the Sixth Amendment of the capital statutory scheme).

[7] Over 32 states now have constitutional provisions protecting the rights of crime victims. *See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. 1, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 22; FLA. CONST. art. I, § 16b; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 8.1; MD. CONST. art. XCVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 8(2); N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 20; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m. While victim's rights are not yet recognized by the United States Constitution, S. J. R. 3, ___ Cong., ___ Session (2002), the Crime Victim's Rights Amendment is currently pending in the United States Senate.

The price of abolishing Arizona's capital sentencing structure would be too high if only applied to Petitioner's case and prospectively. Such a decision would undo the constitutional balance that this Court has struck between the Sixth and Eighth Amendments and that the People of Arizona have ratified through their Legislature. However, if this Court were to apply an abolition of Arizona's capital sentencing structure retroactively, it would have a devastating effect on hundreds of innocent Arizona families – the loved ones of murder victims who must suffer through years of resentencing procedures waiting for justice to be done. In *Morris v. Slappy*, 103 S.Ct. 1610, 1618 (1983), this Honorable Court urged that "in the administration of justice the courts cannot ignore the interests of crime victims."[8]

The Court should consider the interests of crime victims if it holds for the Petitioner. Retroactive application of the holding sought by the Petitioner would require the reversal of death penalty final judgments and force hundreds of innocent victims to endure the uncertainty, pain, and hardship of future sentencing proceedings. The cost of applying such a holding retroactively would fall most heavily on victims by betraying the promise of finality and creating decades of unnecessary litigation. If this Court finds for the Petitioner, this Court ought not to permit the retroactive application of its holding.

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[8] *Walton*, 497 U.S. at 668 (Justice Scalia concurring).

ARGUMENT

I. This Court should continue the balance it has struck between its Eighth Amendment and Sixth Amendment jurisprudence in capital sentencings and, in cases such as this, where Arizona followed precisely the earlier rulings of this court to fashion a "constitutional" procedure for capital sentencings, should deny to the Petitioner the relief he seeks.

"For state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow." *Walton v. Arizona*, 497 U.S. 639, 668 (1990) (Justice Scalia, concurring). Once again, the Arizona capital sentencing structure is before this Honorable Court. Once again, the Petitioner, different in name only, argues that the Arizona capital sentencing structure requiring a judge to find specific aggravating and mitigating factors after a jury verdict finding a defendant guilty of a capital crime violates the Sixth Amendment.

The Respondent counters that, unlike the statutory scheme in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), the trial court's finding of aggravating circumstances does not increase the "statutory maximum" sentence under Arizona's capital sentencing scheme and thus is consistent with the Sixth Amendment. As described by the Respondent, under Arizona law, first degree murder is a capital offense. *State v. Herrod*, 200 Ariz. 309, 343, 26 P.3d 492 (2001). In fact, in *Apprendi*, this Honorable Court reaffirmed Arizona's capital sentencing structure:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990). . . . For reasons we have explained, the capital cases are not controlling:
>
> 'Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all *elements* of an offense which carries as its *maximum penalty*, the sentence of death, it may be left to the judge to decide whether the maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with the actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.' *Almendarez-Torres*, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (Scalia, J., dissenting) (emphasis added). See also *Jones v. United States*, 526 U.S. 227 at 250-251, 119 S.Ct. 1215 (1999).

530 U.S. at 496, 120 S.Ct. at 236 (2000).

Justice Scalia, in his *Walton* concurring opinion expressed the frustration that many feel at the state level:

> "Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing – effectively requiring capital sentencing proceedings separate from the adjudication of guilt, dictating the type and extent of discretion the

> sentencer must and must not have, requiring that certain categories of evidence must and must not be admitted, undertaking minute inquiries into the wording of jury instructions to ensure that jurors understand the duties under our labyrinthine code of rules, and prescribing the procedural forms and sentencing decisions [that] must follow.

497 U.S. 639 at 657 (citations omitted).

The State of Arizona has created a capital sentencing structure in an attempt to comply with this "rulemaking body." The intent of the current sentencing structure is to comply with the varying rules demanded by this Court's jurisprudence by creating a judge sentencing system that can account for the myriad array of judicial rules regarding aggravating and mitigating factors.[9]

Much of the confusion started after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1973) when this Court began developing Eighth Amendment jurisprudence by constraining a sentencer's discretion within certain specific standards so that the death penalty was not inflicted "randomly and capriciously."

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), this Court continued to regulate and rein in the discretion of jurors – " . . . discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[10] In order to comply, Arizona, like

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[9] *See Walton*, 497 U.S. 639, 656-674 (Justice Scalia's concurring opinion discussing this Court's death penalty jurisprudence).

[10] *Id.* at 189, 96 S.Ct. at 2932.

many other states, adopted sentencing procedures that eliminated some of the capital sentencing discretion previously permitted.

Arizona provided the procedural protections described by the Respondent. Now, the Petitioner is arguing that such procedural protections, designed to eliminate the "infrequency and seeming randomness" of the discretionary state systems, constitutes a violation of the Sixth Amendment.[11]

Arizona's capital sentencing structure has been upheld by this Court on both Sixth and Eighth Amendment grounds. *Walton v. State of Arizona*, 497 U.S. 639, 656, 110 S.Ct. 3047 (1990). We urge this Court to reaffirm the constitutionality of Arizona's capital sentencing structure which has struck a fair balance between the Sixth and Eighth Amendments of the United States Constitution.

II. If relief is granted to the Petitioner, this Court, consistent with its holding in *Teague v. Lane*, should be clear to apply any such holding prospectively only so as to not unnecessarily undermine the principles of due process, fairness, and finality for crime victims which are also core values of our criminal justice system

Finality is a core value of Arizona's criminal justice system. Since statehood Arizona's Constitution has promised to its citizens "Justice in all cases shall be administered openly, and without unnecessary delay."[12] More

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[11] *See Walton*, 497 U.S. 658 (Scalia discussing the Eighth Amendment jurisprudence of Justices Stewart and White).

[12] ARIZ. CONST., art. II, § 11.

recently, the people of Arizona amended their constitution to reaffirm explicitly this promise of finality for crime victims.[13] In Arizona's Victim's Bill of Rights, crime victims, including the direct family members of murder victims[14] are afforded the right to a "speedy trial or disposition and prompt and final conclusion of the case after conviction and sentence."[15]

If relief is granted to the Petitioner, this Court, in the interest of preserving the due process, fairness and finality rights that Arizona has promised to its crime victims, should honor the good faith attempt of the State of Arizona to comply with both the Sixth and Eighth Amendment jurisprudence of this Court and consider any abolition of Arizona's current sentencing structure to be a new rule to be applied prospectively only, consistent with this Court's decision in *Teague* and with the majority of Circuit Court decisions addressing the *Apprendi* retroactivity issue.[16] "In our view, the question 'whether a

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[13] At the November 6, 1990 General Election the voters passed Proposition 104 adding Article II, § 2.1, providing for a Victim's Bill of Rights. The Victim's Bill of Rights became effective on November 26, 1990, when the election results were proclaimed by the Governor.

[14] ARIZ. CONST. art. II, § 2.1(C) provides, " 'Victim' means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child, or other lawful representative, except if the person is in custody for an offense or is the accused."

[15] ARIZ. CONST., art. II, § 2.1(A)(10).

[16] *See United States v. Moss*, 252 F.3d 9[illegible] (8th Cir. 2001) (*Apprendi* not a watershed rule that seriously diminishes fairness of trial); *Dukes v. United States*, 255 F.3d 912 (8th Cir. 2001) (following *Moss*); *United States v. Sanders*, 247 F.3d 139, 151

decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.' " *Teague v. Lane*, 489 U.S. 288 at 300 (1989) (quoting Mishkin, Foreword: the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 64 (1965)).

Sentencing structures, similar to Arizona's,[17] have been in place for decades and hundreds of offenders have been sentenced under such structures.[18] If this Court strikes down these capital sentencing laws, but remains silent on the question of retroactivity, it surely will be argued that the Court's holding ought to apply retroactively and that every death sentence under such a law

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(4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000) (under *Teague*, *Apprendi* is not retroactive to issue involving the discrepancy between information and jury instructions). The Arizona Supreme Court has also addressed *Apprendi* retroactivity in *State of Arizona v. Sepulveda*, 201 Ariz. 158, 32 P.3d 1085 (2001) (*Apprendi* is not the type of watershed rule of criminal procedure that implicates fundamental fairness of the trial and that must be accorded retroactivity).

[17] Arizona, Colorado, Idaho, Montana, Nebraska, Alabama, Delaware, Florida and Indiana all have some form of judge sentencing. *See* John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld, *Probing Life Qualification Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209, n. 57 (Summer 2001).

[18] *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEOLJ 387, n. 341 (2002) ("The reasons for the rule of nonretroactivity include judicial efficiency, the psychological value of finality, and the value of comity between the state and federal courts," citing *Teague v. Lane*, 489 U.S. 288, 308 (1989) and Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 361 (1993).

should be overturned and a new sentencing proceeding ordered.

Customarily, a newly created or newly adopted rule of constitutional law cannot be applied retroactively to a judgment and sentence that is final unless the rule fits into one of two exceptions. *Teague v. Lane*, 489 U.S. 288 at 306 (1989). First, a prisoner whose conviction is final can invoke a new rule, if the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1963)). This generally applies to new rules making certain conduct exempt from the legislature's power to define criminal acts and is not implicated by *Apprendi*. *Id.*

The second exception requires the new rule to apply retroactively if it is a fundamental rule that ensures accuracy in the outcome of the trial. *Teague*, 498 U.S. at 313. This exception has been construed narrowly to facilitate the finality of criminal convictions, essential to the effective operation of the criminal justice system and its deterrent effect. *Id.* Since *Teague*, this Court has declined to apply retroactive relief to all habeas corpus cases involving legal claims except one, although this Court has reversed decisions based on factual claims. *United States v. Mandanici*, 205 F.3d 519, 529 (2d Cir. 2000) (identifying "at least eleven new rules" of criminal procedure announced since *Teague* that this Court has declined to apply the second *Teague* exception and are therefore not retroactive).

The Circuit Courts of Appeals addressing the *Apprendi* retroactivity issue have *uniformly* concluded that the

second exception does not apply finding that *Apprendi* is not a watershed rule that goes to the fundamental fairness of a proceeding.[19]

Furthermore, in a post-*Apprendi* decision, this Court stated, "It is unlikely that any of these watershed rules [satisfying the second *Teague* exception has] yet to emerge." *Tyler v. Cain*, 533 U.S. 656, ___ n. 7, 121 S.Ct. 2478, 2484 n. 7 (2001).

Apprendi, if applied to this case, clearly should not be applied retroactively under the second *Teague* exception. The evidence remains the same. Only the sentencer would change if this Court finds for the Petitioner and abolishes Arizona's capital sentencing structure. Such a modification does not invoke the narrowly interpreted exception.

Moreover, any retroactive application of a holding for Petitioner, would contravene important principles of finality that have underscored this court's criminal justice jurisprudence. While born as a minority opinion, Justice Harlan's opinion on the importance of finality now serves

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[19] *See United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (*Apprendi* not a watershed rule that seriously diminishes fairness of trial); *Dukes v. United States*, 255 F.3d 912 (8th Cir. 2001) (following *Moss*); *United States v. Sanders*, 247 F.3d 139, 151 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000) (under *Teague*, *Apprendi* is not retroactive to issue involving the discrepancy between information and jury instructions). The Arizona Supreme Court has also addressed *Apprendi* retroactivity in *State of Arizona v. Sepulveda*, 201 Ariz. 158, 32 P.3d 1085 (2001) (*Apprendi* is not the type of watershed rule of criminal procedure that implicates fundamental fairness of the trial and that must be accorded retroactivity).

as the foundation for much of this Court's jurisprudence on retroactivity.[20] Justice Harlan wrote, "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already *resolved*." *Mackey*, 401 U.S. at 691.

In Tung Yin's 1998 article on this Court's retroactivity jurisprudence, the author explains:

> The initial starting point for understanding *Teague* is Paul Bator's 1963 article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*. This article is cited in *Teague* just once, but its influence permeates the opinion, and in fact, much of the Court's habeas decisions in the post-Chief Justice Warren era.
>
> Professor Bator's thesis was that relitigation of factual matters such as guilt could not be justified solely due to the possibility of a mistake in the previous round of litigation, as the ubiquitous possibility of error would justify endless relitigation. Relitigation of guilt imposes severe costs on society, by using "intellectual, moral, and political resources involved in the legal system," subverting "a judge's sense of responsibility," weakening "the educational and deterrent functions of criminal law," and retarding the rehabilitation of criminal defendants by

[20] *See* Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Peanlty Act*, 25 Am. J. Crim. L. 203, 208 n. 74 quoting *Mackey*, 401 U.S. at 691.

> offering the endless hope of escape from punishment.[21]

25 Am. J. Crim. L. 203, 216-219 (1998).

That finality has become a bedrock principle of this Court's criminal justice jurisprudence and is unequivocally established in *Teague*. This Court wrote that the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principal of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."[22] This Court should not now abandon these bedrock principles but instead take this opportunity to reaffirm them even as the Congress has reaffirmed them on behalf of the American people in the Antiterrorism and Effective Death Penalty Act of 1996.[23] Finally, in deciding whether to apply a rule retroactively, this Court should also look to the core values established in Arizona's criminal justice system. If applying the case retroactively would undermine a core value of that system, it should only do so when there is an express constitutional command. "The Constitution neither prohibits nor requires retrospective effect."[24]

[21] Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act*, 25 Am. J. Crim. L. 203, 216-219 (1998).

[22] Yin at 239 quoting *Teague*, 489 U.S. 288, 309 (1989).

[23] Pub. L. No. 104-132, 110 Stat. 1214 (1986).

[24] *Linkletter v. Walker*, 381 U.S. 618, 619-620 (1965).

Finality is a core value of the Arizona criminal justice system.[25] This Honorable Court should preserve this value unless to do so would contravene a fundamental and express constitutional command. Nothing in the Constitution or in this Court's retroactivity jurisprudence requires such a result.

CONCLUSION

To preserve and protect victims' rights to justice, due process, and finality, the decision of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

STEVE TWIST
Counsel of Record

[25] ARIZ. CONST. art. II, § 2.1(10) guaranteeing crime victims " . . . a speedy trial or disposition and a prompt and final conclusion of the case after the conviction and sentence."